THE COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

2017-P-0901

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE

V.

CAYLA PLASSE,
DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF THE ORANGE DIVISION
OF THE DISTRICT COURT DEPARTMENT

BRIEF AND RECORD APPENDIX OF CAYLA PLASSE

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ISSUE PRESENTED FOR REVIEW

I. Whether, pursuant to the Supreme Court's rationale in Tapia v. United States, 564 U.S. 319 (2011), it is improper for a sentencing court to lengthen a defendant's period of incarceration so that she can complete a rehabilitation program while incarcerated.

PRIOR PROCEEDINGS

On September 26, 2013, a complaint was issued in Orange District Court Docket No. 1342CR000685 charging the defendant with larceny over $250 in violation of G.L. c. 266, § 30(1) (count one) and disguise to obstruct justice in violation of G.L. c. 268, § 34 (count two) (R. 1).[1]

On December 13, 2013, the plea judge (Ross, J, presiding) accepted the defendant's tender of plea to count one and sentenced her to a continuation without a finding for one year with the conditions that she complete Level III Community Corrections and the "stop-lift" program, an Internet based shoplifting course (R. 3).[2]

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[1] The record appendix is cited as "(R.)" and is reproduced post. The transcript of the violation of probation hearing is in one volume and is cited by page number as "(Tr.)."

[2] Count two was dismissed at the request of the Commonwealth (R. 3).

On October 17, 2016, the defendant was found in violation of probation (Ross, J, presiding) on count one and was sentenced to two years in the house of corrections (R. 6).

On March 31, 2017, the defendant filed a motion for release from unlawful restraint and for a new sentencing hearing (R. 7, 9). On May 9, 2017, the defendant's motion was denied by written memorandum and order (R. 7, 10-12). The defendant filed a timely notice of appeal on May 10, 2017 (R. 7, 13). The case was entered in this Court on July 10, 2017.

THE PROBATION VIOLATION HEARING AND SENTENCING

At the probation violation hearing, the defendant stipulated that she was kicked out of the Sober House Program on September 4, 2015 and was absent from the court's supervision from that day until her arrest on a probation warrant on October 3, 2016 (Tr. 2). During that 13-month period, the defendant failed to appear for drug screens, keep the probation department apprised of her address, and pay money to the court (Tr. 2).

Prior to being removed from the program on September 4, 2015 the defendant had violated the conditions of her probation on six prior occasions for, among other things, failure to report to and comply with

community corrections, missing office visits, missing drug screens, testing positive for drugs, admitting to drinking alcohol and using drugs, leaving residential programming (on more than one occasion) and not paying money to the court (Tr. 4-7). During her time on probation, the defendant had her probation conditions modified three times and was in warrant status five times (Tr. 8).

After the parties made their respective arguments, the sentencing judge stated the following:

> "I have to say I've never heard of such a bad case of someone who just can't do it even with Reflections and other programs. And it's frightening because so many people in Ms. Plasse's situation don't make it. So in my head, I'm trying to figure out what kind of help she needs. Where she can get it best and how long it needs to be. One of the things that is standing in the way is wherever she goes, we're going to be talking about half time. If it's a 10 year sentence, we'll be looking at five years, right. So you're looking at half time whatever I give. The second thing is that off of that, you've got to subtract all the time that has been served for which no good has come of it because there's been no treatment and you've got to subtract the good time that she's going to earn while she's in. So we're not talking about, even with the 18 month sentence, we're not talking about much time for treatment before she's going to be back on the street before you can blink an eye especially in [Hampden] County where they release people very early. So, I am going to deviate from both recommendations. I'm going to do so not to punish her but to make sure that she gets through a program and is back out on the street safe and alive. I don't see any way to do it. So I will enter the guilty finding on Count 1, the

sentence is two years at the House of Correction with credit for time served and a recommendation for Howard Street. The defendant stands committed and all monies are remitted" (Tr. 11-12)

ARGUMENT

I. IT WAS IMPROPER FOR THE SENTENCING COURT TO LENGTHEN THE DEFENDANT'S PERIOD OF INCARCERATION SO THAT SHE COULD COMPLETE A REHABILITATION PROGRAM.

This court reviews the denial of a motion brought under Mass.R.Crim.P. 30 (a) for an abuse of discretion. Commonwealth v. Wright, 469 Mass. 447, 461 (2014). Under that standard, the issue is whether the judge's decision resulted from "'a clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

"After the conviction of a defendant, a judge may consider many factors which would not be admissible as evidence in the trial of a case." Commonwealth v. Celeste, 358 Mass. 307, 309-310 (1970). The judge may consider hearsay, the defendant's behavior, family life, employment, and various other factors. There are no formal limitations on the contents of pre-sentence reports. Gregg v. United States, 394 U.S. 489, 492 (1969). The judge is permitted great latitude in

sentencing, provided the sentence does not exceed statutory or constitutional limits. United States v. Latimer, 415 F.2d 1288 (6th Cir., 1969).

Although judges have great latitude in sentencing, this latitude is not absolute, and a judge may not consider improper factors when fashioning a sentence. See, e.g., Commonwealth v. Goodwin, 414 Mass. 88, 93 (1993) (reliable evidence of prior misconduct may be considered for purposes of evaluating defendant's "character and his amenability to rehabilitation," but defendant may not be punished for that other misconduct); Commonwealth v. Howard, 42 Mass. App. Ct. 322 (1997) (improper to lengthen sentence "to target a message to residents of a particular town for the object of deterrence").

Ambiguity as to whether a defendant has been improperly sentenced creates a sufficient concern about the appearance of justice that resentencing is required. See Commonwealth v. LeBlanc, 370 Mass. 217, 224-225 (1976); Commonwealth v. White, 48 Mass. App. Ct. 658, 663 (2000); Commonwealth v. Lewis, 41 Mass. App. Ct. 910, 911 (1996).

It was improper for the sentencing court to lengthen the committed portion of the defendant's

sentence (to two years) so that she could complete a rehabilitation program while incarcerated. In particular, the sentencing judge stated: "So we're not talking about, even with the 18 month sentence, we're not talking about much time for treatment before she's going to be back on the street before you can blink an eye especially in [Hampden] County where they release people very early. So, I am going to deviate from both recommendations. I'm going to do so not to punish her but to make sure that she gets through a program and is back out on the street safe and alive. I don't see any way to do it."

There is no case in Massachusetts that explicitly forbids or allows a sentencing court to give a longer incarcerated term to permit a defendant to take advantage of rehabilitative programming while behind bars. Such action is, however, forbidden in federal court and the reasoning applied by the Supreme Court can be carried over to state court cases. In Tapia v. United States, 564 U.S. 319 (2011), the federal trial court "imposed a 51-month prison term, reasoning that [the defendant] should serve that long in order to qualify for and complete the Bureau of Prisons' Residential Drug Abuse Program (RDAP). On appeal, [the

defendant] argued that lengthening her prison term to make her eligible for RDAP violated 18 U. S. C. §3582(a), which instructs sentencing courts to 'recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.'" (Emphasis added).

The Supreme Court agreed with the defendant. It first gave a brief background of the old system of "unfettered discretion" and how that system gave way to a sentencing guidelines paradigm. The shift came, in part, because of a recognition that neither judges nor parole boards could accurately determine whether an offender had been rehabilitated and that prison was not the proper milieu for rehabilitation:

> "'For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing.' Mistretta v. United States, 488 U.S. 361, 363 (1989). Within 'customarily wide' outer boundaries set by Congress, trial judges exercised 'almost unfettered discretion' to select prison sentences for federal offenders. Id., at 364. In the usual case, a judge also could reject prison time altogether, by imposing a 'suspended' sentence. If the judge decided to impose a prison term, discretionary authority shifted to parole officials: Once the defendant had spent a third of his term behind bars, they could order his release. See K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 18-20 (1998).
>
> *This system was premised on a faith in rehabilitation.* (Emphasis added). Discretion allowed 'the judge and the parole officer to [base] their respective sentencing and release decisions

> upon their own assessments of the offender's amenability to rehabilitation.' Mistretta, 488 U.S., at 363. A convict, the theory went, should generally remain in prison only until he was able to reenter society safely. His release therefore often coincided with 'the successful completion of certain vocational, educational, and counseling programs within the prisons.' S. Rep. No. 98-225, p. 40 (1983) (hereinafter S. Rep.). At that point, parole officials could 'determin[e] that [the] prisoner had become rehabilitated and should be released from confinement.' Stith & Cabranes, supra, at 18.3.
>
> But this model of indeterminate sentencing eventually fell into disfavor. One concern was that it produced '[s]erious disparities in [the] sentences' imposed on similarly situated defendants. Mistretta, 488 U.S., at 365. Another was that the system's attempt to 'achieve rehabilitation of offenders had failed.' Id., at 366. *Lawmakers and others increasingly doubted that prison programs could 'rehabilitate individuals on a routine basis'*—or that parole officers could 'determine accurately whether or when a particular prisoner ha[d] been rehabilitated.' S. Rep., at 40. (Emphasis added). Tapia, supra, at 324-325.

In response to these findings, Congress enacted thorough and exacting guidelines for judges to employ when sentencing offenders. See Sentencing Reform Act of 1984 (SRA). Of importance, the guidelines require "four considerations—retribution, deterrence, incapacitation, and rehabilitation—… and a court must fashion a sentence 'to achieve the[se] purposes . . . to the extent that they are applicable' in a given case. Tapia, supra, at 327. Under the guidelines, a court may *not* take account

of retribution when imposing a term of supervised release. Id. Conversely, the court may not consider rehabilitation when fashioning an incarcerated sentence. Id. Additionally, the SRA instructs the Sentencing Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." See 28 U. S. C. §994(k).

Years of time, effort and financial resources were expended in crafting and updating the SRA. It can and should serve as a guide, when appropriate, to state courts. Congress' decision to disallow courts to consider rehabilitation when sentencing offenders to incarceration was not made without thorough study. "The key Senate Report concerning the SRA provides one last piece of corroborating evidence. According to that Report, decades of experience with indeterminate sentencing, resulting in the release of many inmates after they completed correctional programs, had left Congress skeptical that 'rehabilitation can be induced reliably in a prison setting.' S. Rep., at 38. Although some critics argued that 'rehabilitation should be

eliminated completely as a purpose of sentencing,' Congress declined to adopt that categorical position. Id., at 76. Instead, the Report explains, *Congress barred courts from considering rehabilitation in imposing prison terms …* but not in ordering other kinds of sentences….' (Emphasis added). '[T]he purpose of rehabilitation,' the Report stated, 'is still important in determining whether a sanction *other than a term of imprisonment* is appropriate in a particular case….' Tapia, supra, at 334. (Emphasis added).

Massachusetts courts have not yet decided whether its courts may sentence someone to a term of incarceration or extend her period of incarceration so that she may complete a program of rehabilitation. Based on the authorities and research cited in the Tapia decision, the defendant urges this court to follow Congress's lead and declare that prison is for punishment and punishment alone.

CONCLUSION

For the reasons stated within this brief, the defendant respectfully requests that this court reverse the trial court's denial of the defendant's motion for unlawful restraint and remand the matter to the trial court for a *de novo* sentencing hearing.

RESPECTFULLY SUBMITTED,

CAYLA PLASSE,
BY HER ATTORNEY:

/s/ Edward Gauthier

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CERTIFICATE OF SERVICE

I, Edward Gauthier, hereby certify that on this 30th day of September, 2017, I mailed two copies of the enclosed brief and record appendix via first class mail, postage prepaid, to the Office of the District Attorney for Hampshire-Franklin County, One Gleason Plaza, Northampton, MA 01060.

/s/ Edward Gauthier

_____

Edward Gauthier, Esq.

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M.R.A.P. 16(k) CERTIFICATION

I hereby certify that this brief complies with the following Massachusetts Rules of Appellate Procedure:

M.R.A.P 16(a)(6) (pertinent findings or memorandum of decision); M.R.A.P 16(e) (references to the record); M.R.A.P 16(f) (reproduction of statutes, rules, regulations); M.R.A.P 16(h) (length of briefs); M.R.A.P 18 (appendix to briefs); and M.R.A.P 20 (form of briefs, appendices, and other papers).

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 30TH DAY OF SEPTEMBER, 2017.

/s/ Edward Gauthier

EDWARD GAUTHIER, ESQ.

STATUTORY ADDENDUM

Mass.R.Crim.P. 30(a)

Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

18 U. S. C. §3582(a)

The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

28 U. S. C. §994(k)

The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.